United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by
Richard A. Levin

Docket No. 76-6084

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

JOHN W. FITZGERALD,

Plaintiff-Appellant,

v.

DONALD R. DEVARNEY, Individually and in his capacity as Postmaster of the Post Office in Milton, Vermont; ELMER J. KLASSEN, individually and in his capacity as Postmaster General of the United States Postal Service; RAYMOND A. GORDON, individually and in his capacity as a Rural Carrier with the Post Office in Milton, Vermont; and THE UNITED STATES POSTAL SERVICE, an independent establishment of the Executive Branch of the Government of the United States,

Defendants-Appellees.

P/S

Appeal from the United States District Court for the District of Vermont

BRIEF FOR DEFENDANTS-APPELLEES

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BRIEF FOR DEFENDANTS-APPELLEES

PRELIMINARY STATEMENT

John W. FitzGerald appeals from an order of the United States District Court for the District of Vermont, the Honorable Albert W. Coffrin, United States District Judge, ordering the United States Postal Service to reemploy plaintiff-appellant, but denying plaintiff-appellant any damages. The matter was tried before the District Court from August 6 to 8, 1975, and the findings of fact, opinion and order in Civil

Action File No. 74-164 issued on February 17, 1976.

STATEMENT OF FACTS

Appellant, John W. FitzGerald, was employed by the United States Post Office Department and its successor, the United States Postal Service, as a rural carrier in the Milton, Vermont, Post Office, from December 15, 1959 until November 2, 1970. App.21. 1/ During all relevant times, he was also an active participant in the Air National Guard. App. 21.

Beginning in 1970, Defendant-Appellee Donald R. DeVarney the Postmaster of the Milton, Vermont, Post Office, instituted a series of disciplinary actions against appellant, when appellant refused to produce orders from the Air National Guard to document his requests for leave to participate in military activities. App. 24. Appellant had been very actively participating in military activities on days when he normally would have worked for the Post Office Department, and, from 1967 through 1970, it was not unusual for him to to take well over 100 days of leave per year to participate in military activities. App. 166. The final action in the series of disciplinary actions was the removal of appellant FitzGerald from postal employment, effective December 11, 1970. App. 29. 2/

1/ References to the Joint Appendix are set forth herein as App._____.

2/ The District Court found that the removal action was improper, and appellees do not now dispute that determination. Accordingly, appellees do not here set forth the facts leading to the removal in any detail. They are set forth clearly in the District Court's Findings of Fact. App. 21-30.

During the first one-and-one-half years following his removal, appellant was on full-time active duty with the State of Maine Air National Guard. App. 29. On August 17, 1972, appellant was released from active duty. App. 29. He thereupon sought reinstatement to his prior position in the Milton, Vermont, Post Office. That request was denied on the basis of an August 31, 1971, decision of the Board of Appeals and Review of the Postal Service, which had sustained the removal action. App. 29.

That denial of appellant's request for reinstatement constituted the underlying basis of this litigation. The matter was tried before the Honorable Albert W. Coffrin from August 6 to 8, 1975. At the trial, appellant claimed damages of $50,000, allegedly based on lost wages, (App. 62), lost sick leave benefits (App. 109), lost retirement fund contributions (App. 112), lost vehicle allowance (App. 113), lost life insurance coverage (App. 116), telephone expenses (App. 118), postage and stationary expenses (App. 119), mileage expenses to confer with counsel (App. 120), copying expenses to prepare for trial (App. 121), court costs and witness fees (App. 121), lost strike settlement payments (App. 124), lost overtime (App. 124), interest expenses (App. 126), time spent in efforts to secure reinstatement (App. 128), loss on the sale of silver coins and silver certificates (App. 129), and mental anguish (App. 130). The District Court ordered that

appellant be reinstated as a rural carrier on his old route, or any other route within 35 miles of his home. App. 35-36, 42 n. 14. The District Court found, however, that there was no loss in wages, as appellant was able to participate in military activities "more or less full-time...earning a salary which substantially exceeds what he would have made as a rural letter carrier." App. 30. The Court rejected the remaining damage claims as either improper or unproven. App. 38-39.

Appellant now appeals, alleging that the District Court erred in its calculation of loss of wages, by not considering overtime in the wage loss calculation, in failing to award damages for mileage, court costs, attorney's fees and witness fees, and in failing to order the Postal Service to restore appellant to the same route that he had left in 1970. It appears that, in this proceeding before the Court of Appeals, appellant has dropped his claims to any other damages.

STATEMENT OF ISSUES

I WHETHER THE DISTRICT COURT CORRECTLY COMPUTED APPELLANT'S LOST WAGES.

II WHETHER THE DISTRICT COURT ERRED IN ITS REFUSAL TO INCLUDE OVERTIME COMPENSATION IN ITS COMPUTATION OF APPELLANT'S LOSS OF WAGES.

III WHETHER THE DISTRICT COURT ERRED IN DENYING APPELLANT THE COSTS OF COMMUTING TO HIS INTERIM EMPLOYMENT AND IN DENYING HIM COURT COSTS AND ATTORNEY'S FEES.

IV WHETHER THE DISTRICT COURT ERRED IN REFUSING TO REQUIRE THAT APPELLANT BE RESTORED TO PRECISELY THE SAME POSITION HE HAD VACATED IN 1970.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY COMPUTED THE APPELLANT'S LOST WAGES

The District Court's treatment of the money that appellant FitzGerald received from his activities with the Maine and Vermont Air National Guards during the back pay period was proper. It is within the discretion of the District Court to award damages for violation of 50 U.S.C. App. §459, and there is no absolute requirement that damages be awarded even in cases where a court finds that an employee was not properly restored to a position. Thus, in Boston & Maine Railroad v. Bentubo, 160 F.2d 326, 329, (1st Cir., 1947), the First Circuit stated:

> we are convinced that Congress intended at least to give the district courts discretionary power to reduce damages as was done here....

See also: Levine v. Berman, 178 F.2d 440 (7th Cir., 1969), cert denied 339 U.S. 982 (1950); Special Service Co. Inc. v. Delaney, 172 F.2d 16 (5th Cir., 1949); John S. Doane Co. v. Martin, 164 F.2d 537 (1st Cir., 1947); Walsh v. Chicago Bridge & Iron Co., 90 F. Supp. 322(N.D. Ill, 1949); Smith v. Lestershire Spool & Mfg. Co., 86 F. Supp. 703 (N.D. N. Y., 1949). More recently the Seventh Circuit has also held that damages in veterans re-employment cases are within the discretion of the District Court.

O'Mara v. Petersen Sand & Gravel Co., Inc., 498 F.2d 896 (7th Cir., 1974).

As the circuit court noted in Bentubo, supra. at 328, there is substantial support in the legislative history of the various Selective Service Acts for the proposition that an award of damages for an employer's failure to properly restore a returning veteran is discretionary. The original draft of the 1940 act, which eventually contained the same remedial section as the 1967 version upon which this suit is based, made a failure to reemploy a returning veteran an unfair labor practice within the jurisdiction of the National Labor Relations Board. 86 Cong. Rec. 10079, §8(d), (1940). The remedial power of the National Labor Relations Board was then, and is now, "to take such affirmative action including reinstatement of the employee with or without back pay, as will effectuate the policies of this Act...." 29 U.S.C §160(c). (Emphasis added.) During the course of debate on the bill, Senator Wagner sponsored an amendment which deleted the reference to the National Labor Relations Board and placed that section of the bill into the form in which it was subsequently enacted into law. In discussing the amended version of the bill, Senator Wagner stated, "the court may order that he should receive back pay for lost wages due to the violation of the law." 86 Cong. Rec. 11031 (1940) (Emphasis added.) The fact that the original version

of the bill made back pay discretionary and the fact that the sponsor of the amended version of the bill made the award of damages less than mandatory add substantial support to the First Circuit's conclusion that Congress intended to give the district courts discretion in this area of damages. Boston & Maine Railroad v. Bentubo, supra.

To be sure, certain courts of appeals have held that, given the specific circumstances of the cases before them, the failure to award back pay was an abuse of discretion by the district courts. See e.g. Teamsters Local Union 612 v. Helton, 413 F.2d 1380 (5th Cir. 1969). Examination of those cases, however, establishes that the back pay claims there involved were compelling and that they were distinguishable on their facts from the instant case. In VanDoren v. VanDoren Laundry Service Inc., 162 F.2d 1007 (3rd Cir., 1947), the Third Circuit found that the district court had abused its discretion by not granting back pay to the returning employee. The employee in that case was the epileptic son of the founder of the company. The court noted that it appeared that the epileptic returning veteran was caught in the middle of a family struggle for control of the company, and that, considering all of the factors, it was improper not to award him back pay. In Teamsters Local Union 612 v. Helton, supra., the employer asserted that back pay was unnecessary because the returning veteran was making as much money in the position to

which he was restored as he would have made in the position to which he should have been restored. The circuit court rejected this argument, because the employee had to work a substantial amount of overtime at the new position in order to equal the wages he would have earned at his proper position without being required to work overtime. Thus, the Fifth Circuit found that, by not granting back pay to the employee, the district court had effectively made him work the overtime without compensation. Finally, in O'Mara v. Petersen Sand & Gravel Co., Inc., supra., the court found there was an abuse of discretion in a district court's failure to award damages. However, an apparently telling factor there was the fact that the employer promised the employee that he would have the proper, higher level position as soon as an incumbent employee left, but the employer subsequently reneged on its promise. It is apparent that it was the existence of the special circumstances in these three cases that constituted the grounds for the respective circuit courts to hold that the district courts had improperly exercised their discretion in failing to award back pay to the employees involved. But the circuit courts in those cases did not, in any way, suggest that the underlying statutory provisions do not grant to the district courts the discretionary authority to decide upon the facts of particular cases whether or not damages should be awarded.

The record in the instant case is devoid of any suggestion of special circumstances that required the court below to award damages to appellant FitzGerald. Therefore, the decision of the district court in refusing to award damages was a proper exercise of its discretion. That discretionary action should not be considered lightly. "When judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors." In Re Josephson, 218 F.2d 174, 182 (1st Cir., 1954), cited favorably in Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715 (2d Cir. 1966).

The appropriate rule of damages in cases such as the instant one before the court involves consideration of the wages that the employee lost as a result of the failure to restore him properly to employment, less the amount of money he earned, or could have earned, during the period of improper restoration. Loeb v. Kivo, 169 F.2d 346 (2nd Cir., 1948) cert. denied 335 U.S. 891 (1948). The intent of the underlying statue is to make a veteran whole for the wages that he lost by not being restored to the proper position or not being restored in a timely manner. "The employee, however, has a duty to mitigate damages and such amount earned by

outside employment is applied to reduce the employer's liability [Citations omitted]." Simons v. Chicago Great Western Railway Co., 262 F. Supp. 334, 336 (N.D. Iowa, 1966). See also Smith v. Lestershire Spool & Mfg. Co., supra.,; Allyn v. Abad, 81 F. Supp. 140 (D. N.J., 1948). In commenting upon the veteran's obligation to mitigate, the court, in Reynolds v. S&S Corrogated Paper Machinery Co. Inc., 230 F. Supp. 855 (E.D. NY, 1964), stated:

> If during the year following his discharge the plaintiff earned and received wages and other compensation in excess of the amount he would have received from defendant, if he had continued in its employ, then it is clear that plaintiff suffered no damage. [Citations omitted.]

The rule, as stated in that Reynolds case is precisely applicable to the appellant's circumstances in the instant case. The appellant was fortunate that his interim employment with the Maine and Vermont Air National Guards resulted in his earning more money during the period in question (September 1, 1972 through August 8, 1975) than he would have earned as a rural carrier with the post office. App. 37. Accordingly, he suffered absolutely no damage as the result of the failure of the Postal Service to restore him to a position as a rural carrier.

Appellant urges that the calculations used by the district court below were improper, because they did not take into consideration the amount of money that he could have

earned from the National Guard if he had continued to work at the same time as a postal employee. Contrary to the appellant, the district court's calculations were properly within its discretion. The court did add, to the salary that appellant would have earned as a rural carrier, the monetary equivalent of the military leave and annual leave that he testified he would have taken to participate in military activities. Even granting monetary credit to the appellant, the court found that he made more money by not working for the Postal Service than he would have earned had he continued to work for the Postal Service. App. 37.

Earnings that the appellant would have made from the National Guard, while continuing to work as a postal employee, need not be considered in the computation of damages. Analogous circumstances were present before the court in Cord v. New York Cleaning & Dye Works, Inc., 88 F. Supp. 704 (D. Conn., 1948). In that matter, prior to the discharge of the employee, which was found to be in violation of the Selective Service Act, the plaintiff had augmented his wages through participation in a partnership which operated vending machines. The vending machine work was performed on evenings and weekends, and it did not conflict with the plaintiff's primary employment with the defendant company. After being terminated, the plaintiff took on full time operation of the vending machine business. The court, in computing plaintiff's

lost wages, deducted from the amount of money that he would have earned from the defendant company all of the money that he had earned from the vending machine business. The court even deducted his share of the profits of the partnership. It is seen that the court, in that Cord case exercised its discretion by deducting all of the plaintiff's interim earnings. That action was in complete accord with the holding in Reynolds v. S & S Corrogated Paper Machinery Co., supra, wherein the court stated that the proper method of computation of damages would be to deduct the "wages and other compensation" which the veteran earned and received from "the amount he would have received from defendant." Id. at 858.

Appellant cites two decisions in support of his position that he should receive credit for the earnings that he would have received from the National Guard while serving as a postal employee. Helton v. Mercury Freight Lines Inc., 444 F.2d 365 (5th Cir., 1971); MacKnight v. Twin Cities Broadcasting, 21 L.R.R.M. 2009 (D. Minn., 1947). Those cases simply do not support appellant's position. In Helton, supra., the employee was reinstated by the employer, but he was returned to a position which paid less than the proper position. The court, therefore, correctly held that the employee was entitled to damages, because it was only by performing overtime work that his earnings in the job to which he was restored equalled the earnings he would have

received in the alternative job while working a forty hour week. The court, in Helton, concluded, Id. at 367:

> that he should not have had to work longer hours at the lower pay in order to earn the amount of salary he would have had at the superior grade--and is entitled to monetary compensation for that deprivation.

In the MacKnight case relied upon by appellant FitzGerald, the court did not count earnings from an interim part-time job as part of the mitigation of damages. However, the court stated, Id. at 2009:

> If, after a wrongful discharge, the veteran earns the same wages at other employment working the same number of hours, it should follow that no damages should be allowed.

Thus, the MacKnight holding, like that in Helton, stands for the concept that a restored employee is not obligated to mitigate damages by working in excess of the normal work week that is applicable to the position to which the employee should have been restored. In the record of the instant case, there is no evidence that appellant FitzGerald worked longer hours with the National Guard than he would have worked with the Postal Service. Indeed, appellant himself suggested that precisely the opposite circumstances are present in this case. He testified, App. 97:

> From September 1, 1972, I was employed one-half of the time. I worked for thirty days on active duty and was taken off active duty for a thirty-day period, and then I would go back on for thirty days again.

> Sometimes, this would be forty-five days, but I would be off for forty-five days, so I was actually employed half of the time, but when I was not employed, I did do my regular drills and additional flying training periods that I ordinarily would have done at the post office, and I did receive wages for that which were added into the W-2 Forms for the total amount.

It is seen that, unlike the facts in MacKnight and Helton, supra., appellant was actually earning more money than he would have earned with the Postal Service, while working fewer hours. Accordingly, the proper computation of appellant's damages is the difference between the amount he would have earned with the Postal Service and that he actually earned through interim employment. In this case, as the district court noted (App. 37), appellant's interim earnings were $55,070.47. When this is compared to the $41,458.57 that the Court found he would have earned had he been reemployed by the Postal Service, it is seen that appellant actually made nearly $14,000 more by not working for the Postal Service than he would have earned had he been restored. There was, therefore no "loss of wages or benefits suffered by reason of such employer's unlawful action." 50 U.S.C. App. §459(d). See Reynolds v. S & S Corrogated Paper Machinery Co., Inc., supra.

The court below noted that alternative methods of calculation would not have changed the ultimate result with respect to appellant FitzGerald. The district court computed

the number of days of annual leave that would have been available to appellant for military activity. The court based that computation on appellant's estimate that he used ninety percent of his annual leave for military activity. App. 36. The court also considered the so-called Saturday Rule, whereunder a rural carrier was permitted to take five days of annual leave and receive pay for the Saturday at the beginning, end, or middle of the annual leave period without a charge against annual leave. The court then computed the value of that leave time by multiplying the number of computed days by the pay that appellant would have received for those days from the Postal Service. The resulting figure, $6,135.42, represents an alternate measure of certain additional damages which appellant arguably suffered, because it might be asserted that the amount appellant lost by not being reinstated was the opportunity to be paid twice for certain of his days spent with the National Guard--once by the National Guard and once by the Postal Service.[3/] The court rejected such a theory of computation, however, noting that there is no statutory authorization for paying an employee the monetary equivalent of his accumulated leave. In any event, as the district court pointed out in its well reasoned decision, even

3/ This computation is, in some ways, excessively advantageous to Mr. FitzGerald, as it does not consider that a certain portion of the leave time would have been used in driving from Milton, Vermont, to Bangor, Maine. While FitzGerald would have been paid for such travel time by the Postal Service, he would not also have received military pay for that time.

if the additional $6,135.42 were credited to appellant, he still received more money in interim earnings that he would have received from the Postal Service.

In considering still another alternative form of computation, the district court noted (App. 37-38):

> Nor would a different result obtain if the latter sum of $55,070.47 were compared with the total of plaintiff's postal salary during the period cited plus the amount he would have received from the National Guard for services rendered on military or annual leave time during that same period.

Based on appellant's testimony at the trial, such an additional amount is easily computed. It is, essentially, the same number of days that the district court used in its leave-computations, multiplied instead by the daily rate of pay which appellant received from the National Guard. This method results in a figure of $8,416.85,[4/] which, if added to appellant's Postal Service salary of $41,458.57, equals a net

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4/ The district court found that appellant would have been entitled to the following days of annual leave (App. 44, n.21):

September 1, 1972 to December 31, 1972	10 2/3
1973	36
1974	31
January 1, 1975 to August 8, 1975	18

Appellant testified that his rate of pay from the National Guard was (App. 105):

1972	$51.99/day
1973	54.96/day
1974	59.39/day
January 1, 1975 to February 22, 1975	59.39/day
February 23, 1975 to August 8, 1975	65.31/day

(4/ cont'd. on page 17)

figure of $49,875.42; and the ultimate result would still be more than $5,000 less than appellant earned from the National Guard.

4/ cont'd.

Applying appellant's estimate that he used approximately ninety percent of his annual leave for military purposes, adding the 15 days of military leave per year to which he would have been entitled, and prorating the leave over the 1975 period (based, for convenience on an approximation that the January 1 to February 22, 1975, period is approximately 2/7 of the January 1 to August 8, 1975 period), appellant would have been able to participate in military activities while in a pay status with the Postal Service on the following number of days:

September 1, 1972 to December 31, 1972	24.8 days
1973	47.4 days
1974	42.9 days
January 1, 1975 to February 22, 1975	8.9 days
February 23, 1975 to August 8, 1975	22.3 days

Taking the number of days appellant could have participated in military activities while on paid leave from the Postal Service, and multiplying by the appropriate military rate pay, produces the following potential earnings:

September 1, 1972 to December 31, 1972	$1278.96
1973	2605.11
1974	2547.83
January 1, 1975 to February 22, 1975	528.93
February 23, 1975 to August 8, 1975	1456.02
	$8416.85

Thus, under any of the reasonable methods of calculation considered by the district court, appellant was able to earn more money through participation in National Guard duties than he would have earned from the Postal Service. Nevertheless, appellant would have the Court of Appeals find that a calculation of damages should be based on consideration of all of the days on which he could have participated in military activities as a postal employee. It is submitted that such a method of calculation, which is set out at page 15 of Appellant's Brief and based on appellant's testimony (App.66), would be substantially erroneous. Thus, the appellant's calculation includes credit for military activity performed on days when appellant would have been in leave without pay status. To be sure, the salary that appellant would have received from the Postal Service for those days was deducted. Nonetheless, it seems absurd to suggest that one may inflate a damage claim by the granting of time off without pay from a job to participate in a more lucrative endeavor. More significantly, appellant's calculation is based on military pay for over one hundred days and anticipates military pay of $9,684.91. Such a figure, which is presented as an estimate of appellant's military activity during 1974 had he been working as a postal employee, does not differ substantially from the $12,889.70 which the district court found (App.45, n.27) he earned from his nearly full-time activity with the

National Guard. It strains the bounds of reason for appellant to argue that he would have participated in military activities to such an extent while working as a postal employee and assert, as well, that he met his obligation to mitigate damages. Under the appellant's approach, he would merely have expanded his military activity slightly; such action would have been the equivalent of a significant failure to mitigate damages. That is a firm obligation which the courts have imposed on returning veterans under the Selective Service Act, and one that appellant was not privileged to ignore. Simons v. Chicago Great Western Railway Co., supra.; Reynolds v. S & S Corrogated Paper Machinery Co., supra.; Smith v. Lestershire Spool & Mfg. Co., supra.; Allyn v. Abad, supra. Acceptance of the appellant's approach to the computation of damages would have the totally incongruous effect of permitting him to claim that he would have performed the military duty even if he had continued working as a postal employee and to claim, at the same time, that his earnings from such military duty should be considered as meeting his burden of mitigating his damages.

Appellant has taken issue with the district court's reference to the Back Pay Act (5 U.S.C. §5596) in its computation of damages. It is submitted that such reference was neither erroneous nor prejudicial to appellant. Indeed that statute and the damages provisions of the Selective Service

Act of 1967 (50 U.S.C. App. §459(d)), by which appellant contends the computation should have been governed, are substantially the same in their effect. The Back Pay Act provides, in pertinent part, 5 U.S.C. §5596(b):

> An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in withdrawal or reduction of all or a part of the pay, allowances or differentials of the employee---
>
> > (1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during the period if the personnel action had not occurred, less any amounts earned by him through other employment during that period;....

The Selective Service Act of 1967 (50 U.S.C. App. §459(d) states that an employer found to have violated the act may be ordered by the court:

> ...to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action.

It is submitted that there is no substantive difference between the Back Pay Act's remedy of granting the pay that should have been earned, less interim earnings, and the Selective Service Act's remedy granting compensation for "loss of wages." The standards for computing damages under the Selective Service Act are so general that the reference to the Back Pay Act could, in no way, be deemed out of step

with those standards. In Levine v. Berman, supra. also a Selective Service Act case, the Seventh Circuit held, at 445:

> Congress has laid down no yardstick by which to measure damages recoverable by a person who has been wrongfully refused restoration to his former position. Such being the case the right to recover as well as the extent must be determined by the ordinary rules controlling in any other kind of action when damages are sought as a result of the wrongful act of the other party.

Thus, in the absence ofa"yardstick by which to measure damages," it is submitted that, the court below did not err in referring to the Back Pay Act.

In short, appellant was in the enviable position of having an interim position that paid him more than he would have received had he continued in the position with the Postal Service. Under any rational method of back pay calculation, he suffered no loss of pay. Absent any such loss of pay, the court below would have abused its discretion and have committed reversible error if it had granted appellant a monetary award.

II. THE DISTRICT COURT PROPERLY REFUSED TO INCLUDE OVERTIME COMPENSATION IN ITS COMPUTATION OF APPELLANT'S LOSS OF WAGES

Appellant asserts that the district court erred in not considering overtime in calculating the amount of appellant's lost wages. As noted above, the award of damages was within the discretion of the district court, and the appellant has

not shown that the district court abused that discretion by not granting overtime compensation.

The appropriate rule governing consideration of overtime earnings in cases such as the instant one is set forth in U. S. Department of Labor, Veterans' Reemployment Rights Handbook, (1970) at 133:

> If it is established that the veteran, on the basis of regularly scheduled overtime, a seniority right to overtime, or otherwise, would have worked overtime during the period in question but for the employer's noncompliance, then appropriate overtime pay should be included in computing his damages.

The court below found that appellant did not establish such an expectancy of overtime. Appellant himself testified that he had never been paid for overtime work (App. 125). Such being the fact, the district court properly held the appellant's claim for overtime money was too speculative to support an award of damages based thereon.

III. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT THE COSTS OF COMMUTING TO HIS INTERIM EMPLOYMENT AND IN DENYING HIM COURT COSTS AND ATTORNEY'S FEES

The district court properly denied appellant's claim for $4,263.84, which represented the commuting expense he allegedly incurred in travelling to, and from, his interim military employment. The court also properly denied appellant's request for costs and attorney's fees.

The basis for appellant's claim for commuting expenses was indicated at the trial, as follows: (App. 113-114)

> Q. (Mr. Hayes) Will you explain to the Court the basis on which you claim that you had a loss of money as a result of the loss of car allowance?
>
> A. (Mr. FitzGerald) I am making the claim on the basis that if I had been working at the post office, I would have been paid X number of dollars in each of these years to drive my car on the mail route, and I would have driven Y number of miles. As it was, I was not working for the post office. I drove Y number of miles and did not receive mileage I drove the same number of miles in my partial employment that I would have had I regular employment at the post office.
>
> Q. And what you are saying is that as one of the losses in connection with your new employment, your military employment, you never got mileage but used the same amount of miles in connection with business.
>
> A. Yes, I did.

At a later point in the trial, the court asked (App. 115):

> Were you required, in connection with your Air Force employment, to use your car other than getting to the place where you were supposed to work?

The appellant responded (App. 115):

> No sir, just driving to-and-from home.

The Selective Service Act provides for damages based on "loss of wages or benefits." (50 U.S.C. App. 459(d)). Appellant did not lose wages or benefits by virtue of his commuting to his military duties. When delivering mail on his rural route, the appellant received a mileage allowance paid for the use of his automobile carrying mail. After he began

working for the National Guard, the appellant used his automobile solely to commute to and from work. He had not been paid by the Postal Service for commuting from his home to his job (App. 161). Had appellant used his automobile in the performance of his military duties, and not been paid for such use of his vehicle, he might have been entitled to damages based thereon because it, arguably, would have been a loss of a benefit he received as a postal employee.

It is noteworthy that appellant voluntarily left his postal employment to work full-time for the Maine Air National Guard at Bangor in 1970 two years before his claim for damages accrued. Thus, this is not the case of an employee who was wrongfully discharged from his postal employment who was forced to take a position which required a substantially longer commute than he had previously travelled. Appellant voluntarily moved his place of employment from the Milton, Vermont, Post Office to the Bangor, Maine, air base, and he moved his place of residence from a point two miles away from Milton Post Office to one forty miles away from the Bangor air base.

Appellant asserts that the district court erred in denying him attorney's fees, court costs, and expenses incurred in the course of preparing for litigation. Those amounts were itemized at the trial as follows (App. 120-121):

attorney's fees	$300
photostating expenses	116
fees and mileage to witnesses	240
	$656

Expenses incurred by the appellant in litigating his claim are not properly a part of damages. Thus,

> ...absent a special statute or an exceptional exercise of judicial discretion, such items as attorney's fees, travel expenses... will not qualify either as statutory fees or reimbursable costs. These expenses must be borne by the litigants. 10 C. Wright & A. Miller, Federal Practice and Procedure, (1973) §2666 at 126.

Costs of copying documents are included in attorney's fees. Id. Witness fees and mileage expenses paid to witnesses are similarly not reimbursable. Id. There is no statutory authority under the Selective Service Act providing for the payment of attorney's fees. Indeed, to the contrary, pursuant to 50 U.S.C. App. §459(d), appellant could have been represented by a United States Attorney, at no cost to appellant. It is submitted that appellees may not be penalized because of appellant's decision to be represented by private counsel when free legal representation was available to him.

So much of appellant's claim as represents court costs (which amount has not been itemized) could, within the discretion of the district court, be levied against appellees. However, the court below chose not to levy such costs, and "The allowance of costs to the prevailing party is not

obligatory." 10 C. Wright & A. Miller, supra. §2668 at 139. There is no allegation, nor is there any basis for an allegation, that the district court abused its discretion in refusing to award costs to appellee.

Appellant correctly notes in his brief, at page 20, that costs may not be taxed against the veteran in a veteran's reemployment case. However, that principle may not be turned on its head to mean that the veteran may not be required to bear his own costs.

IV. THE DISTRICT COURT DID NOT ERR IN REFUSING TO REQUIRE THAT APPELLANT BE RESTORED TO PRECISELY THE SAME POSITION HE HAD VACATED IN 1970

The district court found that the Postal Service improperly failed to reemploy appellant after he finished his active duty in the Maine Air National Guard. By way of remedy, the court ordered the Postal Service to "restore plaintiff to his former job or to place him in a similar capacity at a relatively convenient Post Office located within 35 miles of his home...." (App. 42, n. 15) The Postal Service thereupon placed appellant in such a similar capacity within 35 miles of his home. The district court did not err by failing to require the Postal Service to restore appellant FitzGerald to precisely the same position he had held before he left his postal employment to participate in active duty with the military.

The failure to restore the appellant to his position with the Postal Service, upon his return from military service, is not an appealable issue before this court. Rather, appellant was obligated to challenge any allegedly improper restoration through his appeal rights to the Civil Service Commission. 5 C.F.R. §353. Exhaustion of that administrative procedure is required by the applicable statute (50 U.S.C. §459(e)(1), see also 38 U.S.C. §2023(a)). The obligation to exhaust the available administrative procedure was recognized by the court below. It stated (App. 42, n. 15):

> If this [restoration] is not accomplished in a satisfactory manner, it will become necessary for the Civil Service Commission to implement this relief as provided by statute.

The applicable Civil Service Commission regulations governing an appeal from an improper restoration (5 C.F.R. §353.401(a)(iv)), provide:

> Improper restoration. If an employee considered that he has been improperly restored, he may appeal to the Commission not later than 15 calendar days after his restoration.

In a letter dated July 14, 1976, counsel for appellant filed an appeal with the Regional Director of the United States Civil Service Commission in Boston, Massachusetts, alleging that the position to which appellant was restored was not comparable to the position that he had left. On August 11, 1976, counsel for appellant was advised by Harry

Grossman, Chief Appeals Officer, Boston Field Office, Federal Employee Appeals Authority, United States Civil Service Commission, that the Commission had agreed to waive the 15 day time limit for an appeal from an improper restoration and would adjudicate appellant's claim. Such being the case, the issue relating to restoration of the appellant is not ripe for decision by this court. It is the Civil Service Commission, which has statutory jurisdiction over the issue.

Should the court, nevertheless, consider the merits of the restoration issue, it is clear that there is no requirement in the law that a returning employee be restored to precisely the same position that he held before leaving for military duty. Rather, the statute provides that the returning employee shall "be restored to such position or to a position of like seniority, status and pay...." 50 U.S.C. App. §459(b)(A)(i); see also 38 U.S.C. §2021(a)(A)(i). [Emphasis added.) The law contemplates that an employee may be made whole by restoration to a position different from the one he left, provided that the two positions have like "seniority status and pay."

The courts have consistently held that there is no need to restore a returning employee to precisely the same position that he had left, absent unusual circumstances that serve to render an alternative position less than equivalent.

Thus, this court stated in Major v. Phillips-Jones Corp., 192 F.2d 186, 188 (2nd Cir., 1951) cert. denied 343 U.S. 927 (1952):

> It is noted that the foregoing section [§308(b)(B) of the 1940 Selective Service Act, which was identical in all relevant respects to 50 U.S.C. App. §459(b)] in no way requires reinstatement of the veteran to his former position, but only that he be given a position of equal seniority, status and pay to that which he held before his military service.

That Major case is particularly significant here, because the facts are remarkably close to those of the case at bar. Plaintiff Major was a sales representative with an exclusive territory. Upon his return from military duty, he was advised that the company would reemply him as a salesman, but his territory would be different. Major refused, despite the fact that the new territory was so structured that he could continue to use the same city as his base of operations. The court held that the employer had met its obligations under the statute by offering Major the new territory. Similarly in the instant case, the Postal Service has met its obligations under the statute by offering appellant FitzGerald another rural route within reasonable commuting distance of his home. That reasonable commuting distance was set by the district court as 35 miles.

Other courts have also ruled that alternative employment satisfies the requirements of 50 U.S.C. App. §459. See,

e.g. Boone v. Fort Worth & Denver Railway Co., 223 F.2d 766 (5th Cir. 1955); Schwetzler v. Midwest Diary Products Corp., 174 F.2d 612 (7th Cir. 1949); Bova v. General Mills Inc., 173 F.2d 138 (6th Cir. 1949); McCormick v. Carnett-Partsnett Systems Inc., 396 F. Supp. 251 (M.D. Fla., 1975); Atlantic Tobacco Co. v. Morganti, 67 L.C. 12,344 (D.S.C., 1971). Rather than restore the returning employee to a precise prior position, this Court has held that an employer need only offer a returning employee the best available position that his seniority warrants. Feore v. North Shore Bus Co. Inc., 161 F.2d 552 (2nd Cir. 1947).

To be sure, there are a limited number of cases where the courts have required reinstatement to the position that an employee had left. Thus, appellant has referred the Court to Armstrong v. Cleaner Services Inc, d/b/a/ One Hour Martinizing, 67 L.C. P 12,533 (M.D. Tenn., 1972). In the Armstrong case, however, there were several reasons why the court found that the position offered to an employee was not one of "like seniority, status, and pay." The plaintiff in Armstrong had been a plant manager for the defendant. Upon his return from military service, the plaintiff was offered a position as an assistant manager in another city which was apparently out of commuting range from his original home. Additionally, the court noted in Armstrong that plaintiff's

wife was pregnant and had been ordered by her doctor not to travel. In such circumstances of a subordinate alternative position and an undue hardship on plaintiff, the court in Armstrong, held that the proffered position did not satisfy the statutory requirements. It is significant, however, that the court did not order restoration of plaintiff as manager of the plant which he left; rather, it ordered him reemployed as a manager of any one of the three plants that the defendant operated in the city where plaintiff had originally been employed.

In the case of Levine v. Berman, 161 F.2d 386 (7th Cir. 1947) cert. denied 332 U.S. 792 (1947), the court rejected an offer of alternate employment as being inadequate. In that case, however, the employee was offered a different sales territory with a lower commission than he had been receiving when he entered military service. It is noted that the Levine decision was substantially repudiated by the same court in Schwetzler v. Midwest Diary Products Corp. supra. Alternate employment was also rejected by the court in Mihelich v. F. W. Woolworth Co., 69 F. Supp. 497 (D. Idaho, 1946). However, it appears from the Mihelich decision that the alternate position paid less money than the one that plaintiff had left, and it was a less prestigous position.

Appellant has offered no indication in this case that there are any of the special circumstances which were present

in the cited cases wherein the courts held that the various employers did not satisfy their statutory burden by offering alternative positions. The single factor, that appellant has been able to identify as making the new position less acceptable than the old one, is that he must now drive 34 miles round trip per day to get to and from work; previously, he commuted only four miles round trip per day. It is noteworthy, in this regard, that, while appellant was on active duty with the Maine Air National Guard he regularly commuted 80 miles per day (App. 145). In short, the appellant has failed to establish the special circumstances that are essential to show that the court below erred in failing to require that appellant be returned to the position he left in 1970.

The district court also noted that appellant and appellee DeVarney had a personality problem which, in all likelihood, was a core problem in the instant case. Indeed, the district court characterized appellant's statements at the time of the various disputes that gave rise to his litigation as "rather intemperate accusations...which could hardly have failed to provoke any reasonable person." App. 43, n. 19. In such circumstances, there is additional authority for not restoring appellant to his former position with the Postal Service. Thus, the courts have held that, where personality conflicts are such as to make restoration to a job previously held impractical, reemployment to an

Alternative position is permissible under the statute. Dacey v. Trust Funds Inc., 72 F. Supp. 611 (D. Mass., 1947); McClayton v. W.B. Cassell Co., 66 F. Supp. 165 (D. Md., 1946).

CONCLUSION

The decision of the district court should be affirmed in its entirety.

Respectfully submitted,

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August 24, 1976

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

JOHN W. FITZGERALD	)	
v.	)	Docket No. 76-6084
DONALD R. DEVARNEY, et al	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of August, 1976, mailed a copy of the attached Brief to Nancy E. Kaufman, Esq., Rubin & Silverman, Esqs., Box 185, Plainfield, VT 05667, counsel for Appellant Fitzgerald, with postage prepaid.

John R. Hughes Jr.

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